



STATEMENT OF
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BEFORE THE
DEMOCRATIC HEARING
OF THE UNITED STATES
HOUSE OF REPRESENTATIVES

TO INVESTIGATE
THE NATIONAL SECURITY AGENCY'S PROGRAM
OF WARRANTLESS DOMESTIC SURVEILLANCE

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Congressman Conyers, distinguished members of the panel, thank you for inviting the ACLU to speak at this, the first of I hope many Congressional hearings into the NSA's classified program of warrantless domestic surveillance.

Congressman Conyers, we applaud your dedication to civil liberties and the rule of law.

This hearing could not come at a more appropriate time, coming as it does so soon after Martin Luther King Day.

As you know, Dr. Martin Luther King was perhaps the most famous victim of the out-of-control "national security" surveillance conducted by the government in the '50s and '60s. Supposedly to fight communism, the FBI illegally wiretapped, spied on and eventually tried to blackmail one of this nation's greatest citizens.

I'd like to make three short points today about the NSA surveillance.

First of all, I would urge Congress to hold more such hearings. Congress must hold the White House accountable and perform its critical role in our scheme of checks and balances.

I also call on the Justice Department to appoint a special counsel to investigate the program. The American people have the right to know how our rights were violated -- that won't happen unless someone independent of the president runs the investigation.

Second, I urge lawmakers from both sides of the aisle to reject arguments currently being made by the White House to try to justify the spying. In particular, claims that FISA, the Patriot Act, the 9/11 use of force resolution or the president's vague Article II authority make this surveillance lawful are dangerous and wrong.

Third, and most significant, it is crucial to remember that this is not an isolated incident. The Bush administration has a clear record of hostility toward basic constitutional norms and democratic values. There is a pattern and practice of abuse, and the NSA scandal must be seen in this context.

Even a few examples suffice to bring this unfortunate record into sharp relief.

The clearest indication of the White House's disdain for fundamental American freedoms, aside from the NSA scandal, has to be the Patriot Act. For more than four years, reasonable men and women from both sides of the aisle have called on the White House to accept modest changes to the Patriot Act to better balance national security and constitutional liberties. The answer has been a categorical "no."

In addition, the Pentagon has been spying and maintaining files on Americans exercising their first amendment rights.

And so is the FBI. As part of an ACLU FOIA effort in twenty states on behalf of over 100 domestic political and religious groups, the ACLU received numerous documents confirming that the FBI's Joint Terrorism Task Forces are investigating peaceful activists who work on issues ranging from affirmative action, animal and environmental rights, and opposition to the Iraq war.

The White House and Department of Defense have used the tragedy of 9/11 to create a legal framework justifying coercive interrogations and torture as well as to short circuit judicial review of its actions.

On the topic of domestic surveillance and privacy rights, this is the same administration that had retired Rear Admiral John Poindexter develop the Total Information Awareness data-mining system at the Pentagon. That program was supposed to track in real time the electronic footprints of presumably every individual in the United States. The administration also proposed the Operation TIPS program, which would have recruited postal workers and cable technicians to be government snoops.

And the list goes on. Eavesdropping on attorney-client conversations. Implementing an air travel system called CAPPs II that promises to tar millions of innocent air travelers as potential terrorists. Actively seeking to paint its critics as traitors. Secretly deporting suspects to countries that use torture as an interrogation technique. Rounding up thousands of non-citizens after 9/11 on the weakest of leads. Aggressively using what should be limited anti-terrorism powers to side-step traditional checks and balances on its power. And creating arguably the most secretive administration this country has ever seen.

The NSA scandal is the latest and greatest in a long line of abuses. Congress must act.

Along these lines, I would also remind everyone here just *why* we now require judicial supervision of national security surveillance. The short answer has three parts.

First, historically, the executive branch has repeatedly used vague claims of “national security” to justify the sabotage of its political rivals. For instance, many scholars point to J. Edgar Hoover’s deep dislike of Dr. King as the reason for the smear campaign against him.

Second, without a neutral decision maker keeping tabs on wiretaps, physical searches and other invasions of privacy, overeager agents push the limits. In the Cold War, we saw legitimate concerns about Soviet espionage morph into a wholesale snoop campaign into the lives of activists and intellectuals who had nothing whatsoever to do with national security.

And third, because of that tendency to overreach, judicial supervision actually enhances national security by focusing limited investigative resources on real threats. The New York Times reported just this weekend that the NSA surveillance flooded the FBI with thousands and thousands of useless tips. According to the story, it got so bad that agents said they were spending time essentially pursuing a lot of “calls to Pizza Hut.”

The saddest thing about the NSA scandal—aside, of course, from its brazen illegality—is that we’ve seen it before. In the 20th century alone, the United States has seen probably half a dozen major scandals involving warrantless surveillance under the false banner of “national security.”

In the years following the Russian Revolution of 1917, the recently founded FBI used the Red Scare to infiltrate labor groups, round up immigrants and ruin innocent lives.

In the 1950s, ‘60s, and ‘70s, J. Edgar Hoover’s FBI, the CIA and U.S. military conducted a dizzying array of programs in the United States to hunt down “subversives,” all of which were allegedly justified by the Cold War, but had little to do with fighting it.

These programs—with names like COINTELPRO, Operation CHAOS and CONUS—invariably spied on, harassed and kept dossiers on labor leaders,

civil rights workers and students opposed to the Vietnam War. Among other operations on American soil, the NSA itself conducted a program called “Operation Shamrock,” which collected and monitored almost every international telegram sent from New York.

There is a growing public outcry against the NSA’s warrantless surveillance. Polls show that, not only is the public wary of the NSA’s actions, it’s aware of the scandal. Two-thirds of respondents in a recent poll said they were following the story.

This week, the ACLU filed suit on behalf of a distinguished group of plaintiffs, including journalists, scholars and advocates whose work makes them obvious targets of illegal NSA wiretapping. We are challenging the program under the First and Fourth Amendments, and we argue that it violates long-standing separation of powers principles.

Before I go, I’d also like to take an opportunity to correct the record on a key issue. While the ACLU has compared the NSA surveillance to Watergate I want to make very clear that the NSA’s surveillance is, by the president’s own admission, *far more extensive* than that at issue in Watergate. As Nixon’s White House counsel John Dean wrote last month, “here, Bush may have outdone Nixon.”

In closing, I urge Congress to continue to investigate this warrantless surveillance and I urge the Justice Department to appoint a special counsel. If American democracy means anything, it means we are a nation ruled by law. The Bush administration broke our laws by allowing the NSA to decide for itself when and where it could listen to our phone calls and read our e-mails. I hope, for the sake of security *and* liberty, that it will be held accountable. Thank you again for inviting me to be here today.